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THE COURT OF APPEALS FOR THE STATE OF WASHINGTON,  
DIVISION TWO

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IN RE SKYLAR NEMETZ,

Petitioner

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR PIERCE COUNTY  
CAUSE NO. 14-1-04212-6

The Honorable Jack Nevin, Judge

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PERSONAL RESTRAINT PETITION

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## **I. Status of Petitioner & Procedural History**

Petitioner Skylar Nemetz is incarcerated at Coyote Ridge Corrections Center, a Department of Corrections facility in Washington State. He is serving a sentence imposed by the Pierce County Superior Court under cause number 14-1-04212-6.

In October of 2014, Skylar accidentally shot and killed his wife Tarrah Nemetz.<sup>1</sup> *CP 78*.<sup>2</sup> Skylar was not yet 21 years old at the time of the incident. Although the state charged Skylar with premeditated murder, a jury convicted him only of the lesser charge of first-degree manslaughter. *CP 1; CP 76-78*. By special verdict, the jury also found that Skylar was armed with a firearm. *CP 79*.

The conviction reflected a jury finding that Skylar had recklessly caused his wife's death. *CP 64, 67, 78*. Skylar had testified that he accidentally shot his wife while checking to see if one of the couple's many rifles was loaded. *RP (1/25/16) 77-99*.

In his direct appeal, Skylar challenged the firearm enhancement and the trial court's refusal to award Skylar credit for the 16 months he had spent on Electronic Home Monitoring while awaiting trial. The appellate court

<sup>1</sup> Because both the petitioner and the decedent share the same last name, first names will be used. No disrespect is intended.

<sup>2</sup> All reference to the Clerk's Papers and Transcripts relate to the documents filed with this Court in the direct appeal 48788-8-II.

upheld the firearm enhancement but concluded that Skylar should have been given credit for the time spent on Electronic Home Monitoring. *State v. Nemetz*, 3 Wn. App. 1014 (unpublished 2018). Skylar filed a petition for review with the Washington Supreme Court, which was denied. On September 11, 2018, this Court issued a mandate. This timely personal restraint petition follows.

This is Skylar's first collateral attack and he has not previously raised the issues presented here. Skylar is not seeking to proceed at public expense.

## **II. Grounds for Relief**

Relief is required when a petitioner demonstrates that he is restrained and that the restraint is unlawful. *RAP 16.4*. As to the first requirement, Skylar is incarcerated at Coyote Ridge and is serving a sentence on the manslaughter conviction. The first condition of *RAP 16.4* is satisfied.

What constitutes unlawful restraint turns in part upon the nature of challenge raised by the petitioner. Where there is a non-constitutional challenge, the petitioner must establish that "the unlawful restraint is due to a fundamental defect that inherently results in a miscarriage of justice." *In re Rowland*, 149 Wn. App. 496, 507, 204 P.3d 953 (2009). Here, the court failed to first meaningfully consider whether Skylar's young age was a

mitigating factor, before determining there was no basis for an exceptional sentence. The trial court's failure to do so resulted in a complete miscarriage of justice, as Skylar's reckless behavior is a hallmark of youth and immaturity.

### **III. Issues Presented**

1. Courts have struggled with whether a defendant's young age constitutes a mitigating factor justifying an exceptional sentence downward. Traditionally, the age of the defendant could not be a mitigating factor. This was reflected in the statutory language and earlier appellate decisions. Over time, however, this changed. Courts must now meaningfully consider a defendant's youth before imposing a sentence. In the present case, the trial court failed to conduct this necessary inquiry. Should this Court remand for a new sentencing hearing?

2. Compounding the error, the trial court appeared to rely upon conduct specifically rejected by the jury. Specifically, the court rejected that it was the accident Skylar testified to, noting that the bullet penetrated near the exact center of his wife's skull. On remand, should the case be assigned to a different judge for resentencing?

#### **IV. Statement of the Case**

##### **A. Sources of Facts**

The facts relating to this petition are based on the clerk's papers and transcripts filed in the direct appeal under case number 48788-8-II.

##### **B. Sentencing Hearing**

Skylar was convicted of manslaughter in the first degree for the reckless discharge of a firearm, causing the death of his wife. The mens rea for the crime is recklessness. RCW 9A.32.060. At the time of his wife's death, Skylar was only 20 years old.

The defense submitted a presentence report asking for an exceptional sentence below the standard range. *CP 4-9*. The basis for the request was Skylar's young age and the relationship between youth and reckless behavior. *CP 4-6*. The defense cited to *State v. O'Dell*, 183 Wn.2d 680, 358 P.3d 359 (2015) for the proposition that youth constitutes a mitigating factor. *Id.* The State distinguished *O'Dell* because the defendant in that case was barely 18 years old and argued that youthfulness was not a mitigating factor here. *CP 11-12*.

The court imposed a standard range sentence. In doing so, the trial court failed to acknowledge that youthfulness could be a mitigating factor, simply noting "I don't find there is a basis for an exceptional sentence downward as the defense requested in this matter." RP (3/25/16) at pg 4.

Throughout the entire sentencing hearing, the court did not mention Skylar's age or youthfulness at any point during the sentencing.

## V. Argument

- A. When sentencing a young adult to a crime based on reckless behavior, the defendant's youthfulness can establish a basis for an exceptional sentence below the standard range.

Defense counsel correctly noted that the lead case is *State v. O'Dell*, 183 Wn.2d 680, 358 P.3d 359 (2015), which was decided a few months before Skylar's trial. Previously, trial courts had relied upon broad language from the appellate courts that a defendant's age could not relate to the crime, and therefore could not be a mitigating factor. *See e.g., State v. Ha'min*, 132 Wn.2d 834, 847, 940 P.2d 633 (1977); *State v. Law*, 154 Wn.2d 85, 94-98, 110 P.3d 717 (2005) (rejecting the use of age as a mitigating factor).<sup>3</sup>

The Supreme Court's decision in *O'Dell* was science based; citing to recent developments which more clearly verified the significant neurological differences between a youth and an adult. *O'Dell*, 183 Wn.2d at 687. This included recognition that "adolescent brains, and thus adolescent intellectual and emotional capabilities, differ significantly from

<sup>3</sup> *In the Matter of Light-Roth*, 191 Wn.2d 328, 422 P.3d 444 (2018), the Supreme Court clarified that while "O'Dell "broadened our understanding of youth as it relates to culpability," it did not constitute a significant change in the law. With that said, the Court acknowledged that earlier cases had been broadly read to prohibit age as a mitigating factor.

those of mature adults [.]” *Id.*; *see also*, RCW 9.94A.540. Although the Court had previously indicated a belief that a sentencing court could not consider the relative youth of an adult as a mitigating factor at sentencing, the *O’Dell* Court dispelled that notion. *O’Dell*, 183 Wn.2d at 690-91. The Court explained:

The legislature has determined that all defendants 18 and over are, *in general*, equally culpable for equivalent crimes. But it could not have considered the particular vulnerabilities - for example, impulsivity, poor judgment, and susceptibility to outside influences - of specific individuals. The trial court is in the best position to consider those factors.

*Id.* The Court explained that the legislature did not have the benefit of the data underlying recent U.S. Supreme Court cases such as *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455, 2458, 183 L.ED 407 (2012) including the neurological and psychological research showing that ““parts of the brain involved in behavior control’ continue to develop well into a person’s 20’s.” *Miller*, 132 S. Ct. at 2464, *quoting*, *Graham v. Florida*, 560 U.S. 48, 68, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010); *O’Dell*, 183 Wn.2d at 691-92. The *O’Dell* Court noted these fundamental differences have a severe impact on culpability - and thus, potentially, on the sentence:

These studies reveal fundamental differences between adolescent and mature brains in the areas of risk and consequence assessment, impulse control, tendency toward antisocial behaviors, and susceptibility to peer pressure. As

*amici*...put it, “[u]ntil full neurological maturity, young people in general have less ability to control their emotions, clearly identify consequences, and make reasoned decisions than they will when they enter their late twenties and beyond...[t]he [U.S. Supreme] Court recognized that these neurological differences make young offenders, *in general*, less culpable for their crimes[.]

*O’Dell*, 183 Wn.2d at 692. As a result, because “the heart of the retribution rationale” is based on “an offender’s blameworthiness,” the Court noted, where the offender is a youth, the justification for the same sentence as a fully mature adult is much less. *Id.*, quoting, *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455, 2458, 183 L.ED 407 (2012), 132 S.Ct. at 2458.

The *O’Dell* Court recognized this diminished moral culpability for criminal conduct did not automatically end the day the youth turned 18. *O’Dell* at 694. Rather, the Court cited to studies showing that the psychosocial deficiencies of youth persist well into late adolescence and into early adulthood as a matter of cognitive development. *O’Dell*, at 697-99; See Elizabeth Cauffman & Laurence Steinberg. *(Im)maturity in Adolescence: Why Adolescents May Be Less Culpable than Adults*, 18 BEHAV. SCI. &L. 741 (2000). Accordingly, “a defendant’s youthfulness can support an exceptional sentence below the standard range applicable to an adult felony defendant” and “the sentencing court must exercise its discretion to decide when that is.” *O’Dell*. 183 Wn.2d at 698-99.

Lower impulse control, lack of suppression of aggression, inability to foresee consequences, lack of fully developed ability to conform to particular conduct or control behavior, inability to underestimate risks, self-focus to the detriment of others, ability to self-regulate, lesser ability to resist peer influence - every one of these is neurologically linked to developing areas of the brain, such as the prefrontal cortex - areas not fully developed until a person's mid-20s. Laurence Steinberg et al., *Age Differences in Sensation Seeking and Impulsivity as Indexed by Behavior Self-Report: Evidence for a Dual Systems Model*, 44 DEVELOPMENTAL PSYCHOL. 1764 (2008) (indicating that adults make better “adaptive decisions” in situations than youth because of adult ability to resist social and emotional influences and foresee consequences long-term); Adriana Galvan et al., *Risk-Taking and the Adolescent Brain: Who is at Risk?* 10 DEVELOPMENTAL SCI. F8-F14 (2007) (discussing impulse control development).

The weaknesses identified and discussed in *O'Dell* all persist into early adulthood even for youth with the ability of general reasoning and understanding. This is not about “character” or “self-control” as an immutable, fixed ability - this is because “brain structures responsible for logical reasoning, planning, self-regulation, and impulse control are the last to mature and develop.” Kristin Henning, *Criminalizing Normal Adolescent*

*Behavior in Communities of Colo*, 98 CORNELL L. REV. 383, 397 (2013), quoting, Brief of Amici Curiae Supporting Neither Party, American Medical Ass'n et al., filed in *Miller*, supra (Nos. 10-9646, 10-9647) at 14-36. Put another way, “[t]here is incontrovertible evidence of significant changes in brain structure and function during adolescence” which is directly relevant to determining actual culpability and determining the proper sentence to impose. See Laurence Steinberg, *Should the Science of Adolescent Brain Development Inform Public Policy?* 64 AM. PSYCHOLOGIST 739, 742 (2009).

Nowhere is the application of this mitigating factor more evident than in a case involving reckless behavior. As our state supreme court recently acknowledged in *State v. Houston-Sconiers*, one of the “hallmark features” of youth is the failure “to appreciate risks and consequences.” 188 Wn.2d 1, 391 P.2d 409 (2017), quoting *Miller*, supra, 132 S.Ct. at 2468.

B. The trial judge failed to acknowledge that youth can be a mitigating factor and to then exercise his discretion in deciding the application of Skylar’s youth to his reckless behavior.

When the defense seeks an exceptional sentence based on youthfulness, the trial court must consider whether the defendant’s youth constitutes a mitigating factor. Failing to exercise this discretion constitutes reversible error. *O’Dell*, 183 Wn.2d at 698-99.

Once the defense raised the issue of Skylar's youth as a mitigating factor, the trial court was obligated to consider how Skylar's young age impacted his reckless behavior. The court gave no indication of having done so, as reflected by the fact that the court did not once mention Skylar's youth or age. As the Supreme Court recently reaffirmed, "failure to exercise discretion [as to the defendant's youthfulness] is itself an abuse of discretion subject to reversal." *Light-Roth*, 191 Wn.2d 328, quoting *O'Dell*, 183 Wn.2d at 697.

Rather than considering what impact Skylar's youth had on his reckless behavior, the court focused upon his disagreement with the jury verdict. Although referring to the "nature and extent of recklessness," the judge made it clear that he believed the shooting had been intentional:

Whether it was aimed at his wife is no longer before the Court. But there's no question it was pointed at the back of her head, and Skylar Nemetz pulled the trigger of that weapon. The defendant shot a round and it penetrated nearly exactly the center of the back of his wife's skull. Only Mr. Nemetz knows what happened on that day. But with due respect to the defense theory of the case, and I have great respect for the defense theory of the case, and for their advocacy in this case, this was not the accident that Mr. Nemetz testified it was.

RP (3/25/16) 26. This was clearly a rebuke of the jury's finding that Skylar did not act intentionally in shooting his wife.

Given the recent confusion surrounding the issue of youthfulness, and when it can play a role in an exceptional sentence, it is incumbent upon trial courts to specifically address the issue when it is raised by the defense. The failure of a trial court to even acknowledge that youth can be a mitigating factor results in a fundamentally flawed proceeding in which young defendants do not receive sentences commensurate with their level of moral culpability. This represents a complete miscarriage of justice.

#### **VI. Request for Relief**

The trial court failed to consider whether Skylar's youth constitutes a mitigating factor for purposes of sentencing. While the court did not have to rule in Skylar's favor, the court had to address the issue and exercise its discretion. Failing to do so compels a new sentencing hearing. The sentencing judge made comments during sentencing revealing disagreement with the jury verdict, and that this was reflected in the sentence Skylar received. In order to avoid this improper influence on remand, the case should be assigned to a different judge for a new sentencing hearing.

**VII. Oath**

After being first duly sworn on oath, I depose and say I am the attorney for petitioner, I have read the petition, know its contents, and believe the petition is true.

Dated this 10<sup>th</sup> day of September, 2019 in Seattle WA

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**Filing Personal Restraint Petition**

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**Appellate Court Case Number:** Case Initiation  
**Trial Court Case Title:** State of Washington Vs Nemetz, Skylar N  
**Trial Court Case Number:** 14-1-04212-6  
**Trial Court County:** Pierce County Superior Court  
**Signing Judge:** Jack Nevin  
**Judgment Date:** 03/25/2016

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